Filed 1/28/13 P. v. Martinez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH CORONADO MARTINEZ, Defendant and Appellant.	G046418 (Super. Ct. No. 09NF1167) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

An information charged defendant Joseph Coronado Martinez with continuously sexually abusing a child under age 14 over a two-year-period (Pen. Code, § 288.5, subd. (a); count 1)[1] and committing a forcible lewd act on her (§ 288, subd. (b)(1); count 2). Defendant initially pleaded not guilty to both counts. But after trial commenced, he changed his plea on count 1 to guilty, with the understanding he would be sentenced to a maximum prison term of six or 12 years. The People dismissed count 2 pursuant to section 288.5, subdivision (c). The court denied defendant's request for probation and sentenced him to the low term of six years on count 1. (§ 288.5, subd. (a).) On appeal defendant contends the court abused its sentencing discretion by denying him probation. We disagree and affirm the judgment.

FACTS

The victim, L., testified at trial (prior to defendant pleading guilty to count 1). She testified that defendant, her paternal grandfather, molested her in the guest room of his house more than 20 times beginning when she was in second grade until she was in fourth grade. He touched her breasts and vagina over her clothes, kissed her and tried to put his tongue in her mouth, and lay atop her on the bed and rubbed his body against her. Once he held her hand and made her rub his penis under his clothes. More than once defendant had to go to the bathroom after his contact with L. Defendant told L. "it was a secret" and not to tell anyone.

L.'s mother testified that L. — before or after going to defendant's house — would vomit in the middle of the night. L. did not want to visit defendant's house

[1] All statutory references are to the Penal Code unless otherwise stated.

anymore. Her father asked her why, so she told him what had been happening. L. then talked with the police about it.

L.'s father (defendant's son) made a recorded telephone call to defendant. In that call, defendant said, "[S]o the therapist is probably gonna report me and I'll, I'll end up going to jail. . . . I'll probably end up doing some time, but nothing I can do about it." When L.'s father asked if he could tell L. that defendant was sorry, defendant said to tell L. he was sorry and it would never happen again. Defendant said he was "sick," and he knew "it was wrong." At one point, defendant said, "We just kissed, kiss and touch because . . . you know I told her we shouldn't be doing this. And she said come on, come on don't you love me? . . . And, and all of the sudden I just gave in to her." He also said L. touched his penis: "Yea I was in the restroom and she went boo, like that and touched it. I said don't be doing it. . . . That's wrong I told her."

Y., defendant's then 44-year-old stepdaughter, testified that when she was six or seven years old, defendant fondled her vagina with his hand under her clothes. Defendant told Y. not to tell her mother about it. Y. did not tell anyone about the incident until she was in her thirties. But after she had her second child in 1994, she sought counseling and confronted defendant. Defendant said he remembered the incident and was sorry. He promised it would never happen again and he would never do it to anyone else.

A videotape of defendant's interview with a police investigator was played for the jury. In the interview, defendant stated he had just turned 60 years old. He said L. came into the restroom when he was urinating and tried to grab his penis; he told her not to do that. He admitted kissing L. on the buttocks twice and kissing her vagina over her clothes once when she was seven years old. It happened when they were "fooling around," "playing around." He said he would get on the bed in the guest room with L. to watch television. As to Y., defendant admitted kissing his stepdaughter once on the mouth and "on the front" when she was seven years old, and touching her vagina over her

clothes and carrying her to the bedroom. These behaviors started when he was "playing around" with the girls. When asked to fantasize, he said that if he had not stopped himself after he carried Y. to the bedroom, he would have undressed her and kissed her body. He would have had oral sex with L. He said he has a "problem," which involves "just things that happen playing around," and that he does not "know what's causing that problem." He said he was sexually attracted to a seven-year-old girl because of her innocence and because she was young and tender.

DISCUSSION

Defendant contends the court abused its discretion by denying him probation. He asserts all relevant facts pointed toward granting him probation and that the court's denial fell outside the bounds of reason.

In determining whether to grant or deny probation, a court must consider the probation report. (§ 1203, subd. (b)(3).) The probation report describes aggravating or mitigating facts concerning the crime or the defendant. (*Id.*, subd. (b)(1).) Generally, if "the court determines that there are circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be served by granting probation to the person, it may place the person on probation." (*Id*., subd. (b)(3).)

But for a defendant convicted of violating section 288.5, additional restrictions on probation apply. First, under section 1203, and because a section 288.5 violation triggers sex offender registration requirements (§ 290, subd. (c)), the probation report must "include the results of the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO)" (§ 1203, subd. (b)(2)(C)). Second, a court may not suspend the sentence of a person convicted of committing a lewd act on a child under age 14 until the court obtains a report from a psychiatrist or psychologist on the offender's mental condition. (§ 288.1.)

Further limitations on the grant of probation for section 288.5 violators are set out in section 1203.066. As relevant here, "[n]otwithstanding Section 1203, or any other law, probation shall not be granted to" "[a] person who, in violating Section 288 or 288.5 has substantial sexual conduct with a victim who is under 14 years of age." (*Id.*, subd. (a)(8).[2] If, however, the substantial sexual conduct is not pleaded or not proved by the People (or admitted by the defendant in open court) (as required by § 1203.066, subd. (c)(1)), the court *may* grant probation to the defendant, *but only if* (1) the court finds rehabilitation of the defendant is feasible and the defendant is amenable to undergoing treatment; (2) the defendant is placed in a recognized treatment program; and (3) the court finds that granting probation would not create a threat of physical harm to the victim (§ 1203.066, subd. (d)(1)(B)(E)) (the section 1203.066(d)(1) conditions).[3] Here, defendant pleaded guilty to count 1, which alleged generally a violation of section 288.5. Section 288.5 can be violated in two ways: (1) by engaging in three or more acts of substantial sexual conduct (as defined in § 1203.066, subd. (b)) with a child under the age of 14 years, or (2) by engaging in three of more acts of lewd or lascivious conduct (as defined in section 288) with a child under the age of 14 years. Section 288 requires that defendant have the "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of [the defendant] or the child." Thus, under the first prong of section 288.5, there is no requirement that defendant have the specific intent to arouse sexual desires; it is enough that defendant engages in substantial sexual conduct, as defined.

---

[2] "'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." (§ 1203.066, subd. (b).)

[3] Other conditions specified in section 1203.066, subdivision (d)(1) are inapplicable here, since they relate to a defendant who is a member of the victim's household. (*Id.*, subd. (d)(1)(A) & (C).)

Under the second prong, however, defendant must be shown to have the requisite specific intent.

Count 1 of the information alleged that defendant violated both prongs of section 288.5; defendant "did unlawfully engage in three and more acts of substantial sexual conduct and lewd and lascivious conduct with" L. As the basis for defendant's guilty plea, he stated, "[O]n or about and between 6-1-06 & 6-11-08 I willfully and unlawfully had recurring access to my granddaughter, [L.], a child between the age of 6-9 years old, and did unlawfully engage in three or more separate lewd acts upon her body during a period of time over 3 months, with the intent of arousing and appealing to my sexual interest in the child." Thus, defendant admitted violating only the second prong (lewd conduct) of section 288.5, not the first prong (substantial sexual conduct). Accordingly, the court could not grant probation unless it was able to find the section 1203.066(d)(1) conditions to be satisfied.

"A trial court has broad discretion in determining whether or not to grant probation." (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 825.) A "defendant bears a heavy burden when attempting to show an abuse of that discretion." (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) A "decision denying probation will be reversed only upon a clear showing that the court exercised its discretion in an arbitrary or capricious manner." (*People v. Groomes* (1993) 14 Cal.App.4th 84, 87.)

At the sentencing hearing, the court tentatively found defendant was eligible for probation *if* the section 1203.066(d)(1) conditions were met. The court acknowledged it was required to review the psychiatrist's section 288.1 report. The court found the following facts under California Rules of Court, rule 4.414 as to the circumstances of the crime: (1) Defendant's offense was more serious than other instances of the same crime because the victim was his biological granddaughter whom he "sexually abused . . . on several occasions over a period of at least two years"; (2) "The victim was vulnerable when compared with other victims of similar crimes because

she was very young, six years old at one point in time, and considering the family relationship, she trusted her grandfather"; and (3) The young victim would carry the emotional injury with her for the rest of her life, especially because defendant had violated her trust. The court had searched for mitigating factors relating to the crime and had found none.

The court found defendant's molestation of his stepdaughter, around 30 years ago, was strong evidence of a pattern of continuing conduct. It also found defendant appeared to be remorseful and had no history of prior criminal conduct, "none at least that he was charged with." The court did not believe that, given defendant's conduct over a span of 30 years, his rehabilitation was feasible. The court also concluded that given defendant's history, he was "a danger to the victim as well as others." Accordingly, the court denied defendant's application for a grant of probation.

The court did not abuse its discretion by denying probation to defendant. Defendant was eligible for probation *only* if all the section 1203.066(d)(1) conditions were met. They were not. The court expressly found that rehabilitation of defendant was not feasible, given his history over a 30-year period. Substantial evidence supports the court's finding. The record shows defendant had a problem he could not control which caused him to molest Y. and L. when each girl was six or seven years old.[4]

---

[4] Defendant relies heavily on the psychiatrist's section 288.1 report and his SARATSO score. The psychiatrist's report stated defendant seems to "have some sexual psychopathology," but the available information does not prove he "suffers from pedophilic disorder." According to the psychiatrist, a pedophile "has either exclusive or consensual sexual interest in minors" and, in contrast, defendant's conduct appeared "more opportunistic than preferential sexual contact with minors." The psychiatrist concluded defendant is "capable of refraining from further antisocial behavior because his actions have been brought to the attention of authorities and his pro-social motivation will prevent him from further inappropriate behavior."

Defendant's SARATSO score placed him in the low risk category, with the lowest possible score for recidivism. Risk factors considered in a SARATSO test include "the presence of prior sexual offenses, having committed a current non-sexual violent offense, having a history of non-sexual violence, the number of previous sentencing

But defendant challenges the court's findings on the California Rules of Court, rule 4.414 criteria, arguing, for example, that all victims under age 14 are vulnerable and therefore L. at age six was not *particularly* vulnerable. These arguments are unpersuasive. The court's findings are supported by substantial evidence. And, in any case, defendant was ineligible for probation under section 1203.066, subdivision (d)(1)(B), since the court found he was not amenable to rehabilitation.

---

dates, age less than 25 years old, having male victims, having never lived with a lover for two continuous years, having a history of non-contact sex offenses, having unrelated victims, and having stranger victims.

In contrast to these relatively favorable assessments, defendant's probation report recommended he be denied probation. The probation officer cautioned that the SARATSO test is not to be used in isolation, but only in conjunction with other considerations and recommendations. In addition, the probation officer disagreed with the psychiatrist's opinion and concluded defendant presents a risk to the community.

The court expressly stated it was according little weight to the SARATSO score and the psychiatrist's report, noting that the Static 99 evaluation underlying the SARATSO score is a relatively new test, and finding both evaluations to be contrary to (1) defendant's 30-year course of conduct (including sexual abuse that continued for two years with L.), and (2) his statement he was sexually attracted to L. because she was so young and tender. We note that both assessments appear to minimize the possibility defendant could have future opportunities in his home to "opportunistically" commit nonviolent sexual offenses upon a vulnerable victim who could be pressured into secrecy, for example, a neighbor child. The court was not required to discount this possibility. In any case, just as the court was not required to follow the probation officer's recommendation (*People v. Hernandez* (1980) 111 Cal.App.3d 888, 898), it was not obliged to conform its ruling to the psychiatrist's opinion or the SARATSO test scores.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.